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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**No. 41832**
	)	
v.	)	
	)	
VICTORIA MORIN,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL MCLAUGHLIN
District Judge

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FILED - COPY
AUG 19 2014
Supreme Court Court of Appeals
Entered on ATS by

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STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

Victoria Morin was arrested for Driving Under the Influence (*hereinafter* DUI), a violation of Idaho Code § 18-800. A Request for Discovery was filed by the defense and in the State's Second Addendum to Discovery it disclosed Dr. Gary Dawson as an expert witness. The defense filed a Motion to Compel Discovery for a written summary or report of the expert testimony it expected to present and the facts and data underlying the expert's opinion upon which the expert would rely during his testimony. A Motion in Limine was also filed to exclude any reference to Carboxy-THC. A hearing was held at which time the trial court denied the defendant's motion to compel and provisionally denied the Motion in Limine.

The case proceeded to a Jury Trial; at which time Ms. Morin was convicted by a jury of DUI. Ms. Morin timely filed her Notice of Appeal, the District Court heard argument and took the matter under advisement. The District Court issued its Memorandum Decision and Order affirming the conviction upon which Ms. Morin now timely appeals. On appeal, Ms. Morin asserts that the trial court erred when it: 1) denied Ms. Morin's Motion to Compel thereby denying her of her Constitutional right to due process and a fair trial guaranteed to her by the Fourteenth Amendment to the United States Constitution and Article 1, § 13 of the Idaho Constitution when it allowed testimony over objection regarding Dr. Gary Dawson's expert opinions which were never disclosed to the defense prior to trial; 2) denied Ms. Morin's Motion in Limine to exclude testimony and evidence regarding Carboxy-THC a simple metabolite of THC.

Statement of the Facts

Victoria Morin's vehicle was stopped fully on the side of the road, out of a lane of travel when Trooper Jayne initiated his contact on February 24, 2012 at approximately 5:57 p.m. (6/23/13 Tr. p.217, Ls.23-25 – p.218, Ls.1-8). Ms. Morin's hazard lights were blinking, and Trooper Jayne observed no traffic or law violations. (6/23/13 Tr. p.217, Ls.23-25 – p.218, Ls.1-8). Ms. Morin approached Trooper Jayne and advised him that her vehicle was out of gas, that incident response was on their way, and that she had called her sister. (6/23/13 Tr. p.218, Ls.20-23). Trooper Jayne then began a DUI investigation. (6/23/13 Tr. p.219, Ls.1-4).

During the initial encounter at the driver's side door, Trooper Jayne did not observe the odor of marijuana, nor did he observe glassy or bloodshot eyes. (6/23/13 Tr. p.221, Ls.1-11). Based on Trooper Jayne's observations, and the information provided by dispatch, he asked Ms. Morin to perform Field Sobriety Tests. (6/23/13 Tr. p.156, Ls.5-25)(6/23/13 Tr. p.159, Ls.19-21). Ms. Morin did not pass any of the tests and was placed under arrest for DUI. (6/23/13 Tr. p.158, Ls.8-20). After Ms. Morin was placed in Trooper Jayne's vehicle for transport to jail, Trooper Jayne still did not observe the odor of marijuana. (6/23/13 Tr. p.221, Ls.11-15).

After Ms. Morin was transported to jail, Trooper Jayne conducted a Drug Recognition Evaluation (*hereinafter* DRE). (6/23/13 Tr. p.186, Ls.1-6). As a result of the DRE, Trooper Jayne concluded that Ms. Morin was under the influence of Cannabis and unable to operate a motor vehicle safely. (6/23/13 Tr. p.206, Ls.15-18). Mr. Morin admitted to having used marijuana about a week earlier (6/23/13 Tr. p.207, Ls.1-2), and provided a blood sample. (6/23/13 Tr. p.209, Ls.1-3). Throughout the encounter, Ms. Morin was polite, cooperative, and did not argue about anything. (6/23/13 Tr. p.212, Ls.9-15).

ISSUES

I. Did the trial court err when it denied Ms. Morin's Motion to Compel thereby denying her of her constitutional right to due process and a fair trial guaranteed under the Fourteenth Amendment to the United States Constitution and Article 1, § 13 of the Idaho Constitution when the trial court allowed testimony over her objection regarding Dr. Gary Dawson's expert opinions, which were never disclosed to the defense prior to trial?

II. Did the trial court err when it denied Ms. Morin's Motion in Limine, which sought to exclude testimony regarding Carboxy-THC, a simple metabolite of THC?

ARGUMENT

I.

The Trial Court Err When It Denied Ms. Morin's Motion To Compel Thereby Denying Her Of Her Constitutional Right To Due Process And A Fair Trial Guaranteed Under The Fourteenth Amendment To The United States Constitution And Article 1, § 13 Of The Idaho Constitution When The Trial Court Allowed Testimony Over Her Objection Regarding Dr. Gary Dawson's Expert Opinions, Which Were Never Disclosed To The Defense Prior To Trial.

A. Introduction

When the Court denied Ms. Morin's Motion to Compel production of the information sought, it approved of the State's continuing violation of Idaho Criminal Rule 16. Furthermore, such error was not harmless, and the State should have been compelled pursuant to the rules of discovery to provide Ms. Morin with the underlying facts and data which would tend to substantiate Dr. Dawson's expert opinions.

Ms. Morin was further denied her constitutional right to due process and a fair trial when over objection the trial court allowed Dr. Dawson to testify to expert opinions without any prior disclosure of those opinions and the underlying facts and data for those opinions. Therefore, Ms. Morin was unable to adequately challenge the evidence presented against her or adequately cross-examine Dr. Dawson

B. Standard of Review

The trial court's refusal to compel the State to disclose the expert opinion of Gary Dawson and the underlying facts and data for that opinion as well as the Court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Thorngren,* 149 Idaho 729, 731, 240 P.3d 575, 577 (2010). Generally speaking, the lower court has sole discretion in deciding whether to admit or exclude evidence. *State v. Howard,* 135 Idaho 727, 731, 24 P.3d 44, 48 (2001). But, this discretion is not unlimited. The trial court must exercise reason in its decision making. *Id.*

Nonetheless, this "broad discretion in the admission of evidence at trial will be reversed only where there has been a clear abuse of that discretion." *Id.* at 732, 24 P.3d at 49.

In reviewing a discretionary decision of a trial court, this Court reviews the record to determine if the lower court: (1) perceived the issue as one of discretion; (2) acted within the bounds of discretion and consistently with any legal standards; and (3) reached its decision by an exercise of reason. *State v. Johnson*, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010).

1. The Trial Court Erred When It Denied Ms. Morin's Motion To Compel The Opinions, And The Facts and Data Underlying The Opinions, Of The State's Expert Gary Dawson.

The trial court erred when it denied Ms. Morin's motion to compel Dr. Dawson's expert opinion. The State is required by Idaho Criminal Rule 16 to disclose a written summary or report of the expert testimony it expects to present and the facts and data underlying the expert's opinion upon which the expert will rely during his testimony.

Idaho Criminal Rule 16 (b)(7) provides:

> Upon written request of the defendant the prosecutor **shall** provide a written summary or report of any testimony that the state intends to introduce pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence at trial or hearing. The summary provided **must** describe the witness's opinions, and the witness's qualifications.

I.C.R. 16(b)(7) (emphases added). This is not an optional rule, or suggested practice, that the state can choose to follow or ignore. It is specifically laid out in the rules regarding discovery, and the defendant need only make a written request, which burden was satisfied when, in the original request for discovery, Ms. Morin requested:

> (8) [A] written summary or report of any testimony that the state intends to introduce pursuant to rules 702, 703, or 705 of the Idaho Rules of Evidence at trial or hearing; including the witnesses' opinions, the facts and data for those opinions, and the witnesses' qualifications.

(R., p.15). Rule 705 permits an expert to testify in terms of opinion or inference and give the reasons therefore without prior disclosure of the underlying facts or data provided that the court may require otherwise, ***and*** provided further that, if requested pursuant to the rules of discovery, the underlying facts and data were disclosed. I.R.E. 705.

A witness is qualified as an expert by his or her knowledge, skill, experience, training, education, or other specialized knowledge. *Id.* The test for determining whether a witness is qualified as an expert is "not rigid" and can be found in Idaho Rule of Evidence 702. *West v. Sonke*, 132 Idaho 133, 138–39, 968 P.2d 228, 233-34 (1998). Idaho Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702.

This Court has observed,

> An "expert" in a court proceeding is someone possessing skill or knowledge **beyond the competency of the average juror**. Formal training or an advanced degree is not essential to qualify a witness as an expert, but practical experience or special knowledge must be shown to bring a witness within the category of "expert."

IHC Hosp., Inc. v. Bd. of Comm'rs, 108 Idaho 136, 142, 697 P.2d 1150, 1157 (1985) (emphasis added), overruled on other grounds by *Intermountain Health Care, Inc. v. Bd. of Comm'rs*, 108 Idaho 757, 762, 702 P.2d 795, 800 (1985).

Idaho Rule of Evidence 702 indicates that expert witnesses may testify "in the form of an opinion or **otherwise**." I.R.E. 702 (emphasis added). The term otherwise, as used in I.R.E. 702, indicates that the determination of whether a witness is an expert does not depend solely on whether he or she testifies to an opinion. Indeed, simply providing specialized knowledge to the trier of fact is enough to render a witness an expert under Rule 702.

In this case the only disclosure made by the state with regard to Dr. Dawson's testimony is as follows:

> Dr. Dawson is an expert in toxicology and pharmacology and will assist the trier of fact in understanding the evidence regarding the effects of drugs on the behavior and performance of the defendant as reported in this case. Dr. Dawson will utilize known and generally accepted scientific principles of absorption, distribution, metabolization and excretion of drugs. Testimony may include information on the effects of the drugs consumed by the defendant in this case and the possible effects of said drugs.

(R., p.43) . (4/08/13 Motion Hr., p.15, Ls. 1-12). Because the trial court denied Ms. Morin's Motion to Compel, and the State was not required to provide a written report of Dr. Dawson including his opinions and the underlying facts and data upon which he relied, which would tend to substantiate his findings, Ms. Morin was unable to adequately defend herself against the state's accusations. Passages of Dr. Dawson's testimony are included below in Section 2 and are hereby incorporated by reference. This testimony was far greater than what the state's disclosure revealed.

Ms. Morin was unable to challenge the evidence presented against her at trial and unable to adequately cross-examine Dr. Dawson or challenge any provided testimony. The State's minimal, non-specific disclosure was a discovery violation, and the trial courts denial of Ms. Morin's Motion to Compel was an abuse of discretion that does not pass the harmless error test.

2. Ms. Morin Was Denied Her Constitutional Right To Due Process And A Fair Trial Guaranteed Under The Fourteenth Amendment To The United States Constitution And Article I, § 13 Of The Idaho Constitution When The Trial Court, Over Her Objection, Allowed Testimony Regarding Dr. Gary Dawson's Expert Opinions Which Were Never Disclosed To Her Prior To Trial

It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and

capricious acts of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973)). Due process also demands an opportunity to be heard "at a meaningful time and in a meaningful manner." *Gray v. Netherland,* 518 U.S. 152, 182 (1996). Thus, due process is violated if a defendant is not afforded "a reasonable opportunity to meet [the charges] by way of defense or explanation." *In re Oliver,* 333 U.S. 257, 275 (1948); *see also State v. Montroy,* 37 Idaho 684, 690, 217 P. 611, 614 (1923) ("It is the public policy of this state, disclosed by constitutional guaranties as well as by numerous provisions of the statutes, to accord to every person accused of crime ... every reasonable opportunity to prepare his defense and to vindicate his innocence upon a trial.") and *State v. Meister,* 148 Idaho 236, 239, 220 P.3d 1055, 1058 (2009).

When Dr. Dawson was called to testify, foundation was laid for his experience and training. (6/23/13 Tr. p.402-409). When the State began to ask questions regarding Ms. Morin's case, defense counsel objected and what follows is the colloquy between defense counsel and the Court:

> Q. Doctor, have you had opportunity to review the reports prepared by Corporal Jayne?
>
> [Defense] Judge, I'm just –
>
> A. Yes.
>
> [Defense] – going to, for the record, my standing objection to this doctor being able to testify with regards – with regards to pre-trial issues. And I'd like my standing objection to be heard based on the discovery rule violation, as well as due process for Victoria.
>
> I understand it's overruled, you – we said that, but I would like my standing objection just to be on the record with regard to any testimony that he's providing.

The Court: All right. That's noted for the record.

(6/24/13 Tr., p.409, Ls.23 - p.410, L.14.)

Dr. Dawson testified as an expert at trial. (6/23/13 Tr. p.409, Ls.18-22).The following is testimony which was offered by Dr. Dawson with regard to his opinion as to whether Ms. Morin was impaired and unable to operate a motor vehicle safely:

Q. Can you explain for the jury what carboxy THC is?

A. Carboxy THC is the inactive metabolite of tetrahydrocannibinol, which is one of the primary components in the marijuana leaf.
...

A. The other piece that it tells us is if we see it in the blood, that there's one of two possibilities. In chronic smokers, it can be persistent there. Smokers of marijuana, it could be there for some period of time. In infrequent smokers, it's more likely that the exposure was acute.

Q. Explain that; what do you mean the exposure being more acute?

(6/24/13 Tr., p.410, Ls.25 - p.411, L.24).

Q. And you stated that Carboxy THC is an inactive metabolite?

A. Yes.

Q. Does it have any effect on the body, on a person's ability to perform functions?

A. No.

Q. But you stated that there are other indications that you look for to determine a window. What other indications would you be looking for?

A. There are a number of physical symptoms one would begin to look for in terms of indication of impairment. ... there might be other contributing factors as well. ...

So, we would begin to look for physical signs and symptoms. ...

There's often problems with – with other aspects of cognitive function, which may have to do with the – the ability to think clearly, the ability to make decisions, short-term memory loss, the ability to have a -- a – a conversation that is reflective of the current context within which the – the individual is being interviewed. It's not

unusual to see disconnective speech or though patterns that don't follow during that acute exposure.

There's also the psychomotor function. ...

...

... -- a coating on the tongue, a green coating on the tongue, which would indicate reasonable recent exposure.

(6/24/13 Tr., p.413, Ls.2 - p.415, L.18).

Q. Thank you. Additionally amphetamine was found in the defendant's blood.

A. Yes.

Q. Can you describe for the jury what amphetamine is?

A. Amphetamine is a central nervous system stimulant.

...

Q. Would they cancel each other out.

A. Not necessarily because – there's – theres's a couple of reasons, and we start getting – at – at the risk of getting too far out in the weeds here, I want – the – the amphetamine works at the one set of receptors. And the tetrahydrocannibinol works at the different set of receptors. ...

...

Tachyphylaxis means you keep stimulating something long enough, it – its response to that stimulation goes away -- not -- it doesn't go away, but it becomes less noticeable. And in – in effect, its sort of – it's – it's sort of like a battery that if you keep flashing the light on and off, on and off, on and off, pretty soon it gets dimmer, and dimmer. And dimmer, and dimmer, and pretty soon it might stay on, but it's very, very dim compared to what it was at first.

And so, that's – that's the effect that amphetamine has on nerve terminals. It causes the -- the neurotransmitters to be depleted over a period of time.

(6/24/13 Tr., p.424, Ls.8 - p.430, L.7).

Q. Additionally, venlafaxine and nor-venlafaxine were reported in the blood. Can you describe those drugs?

...

A. and so, that, in effect with taking Effexor as an anti-depressant, you're getting two for the price of one. So, as Effexor, the venlafaxine is metabolized to nor-

venlafaxine in the body, not only is the Effex – the venlafaxine exerting an effect, its metabolite is active and its exerting an effect.

...

Q. And the Effexor -- because it is an easier word to say -- is that a central nervous system depressant, or stimulant, or something different?

A. In -- in -- in the sense of the -- the DRE exam, it falls within the category of CNS depressants.

...

And so, the -- the issue with the central nervous system depressant, the gaze that we look at is one of the things we specifically identify as being associated with a central nervous system depressant, whether its alcohol, or narcotics, or sleeping pills, or whatever. It has to do with the motor control, the muscles that move the eye.

Q. And you say there's been no reporting of Nystagmus with Effexor?

A. I -- I am not aware of any, no.

...

A. When you begin to add -- when you add medications together that exert similar effects in -- in the brain, in terms of -- of depressant effects, you get something -- a phenomenon we know as -- as an additive effect.

(6/24/13 Tr., p.421, Ls.1 - p.423, L.2

Ms. Morin contends that the trial court erred when it allowed testimony from Dr. Gary Dawson regarding his opinions when those opinions were not disclosed to the defense prior to trial and of even more importance Dr. Dawson could not provide the facts and data upon which his expert testimony was based. At trial, Dr. Gary Dawson, offered the following testimony regarding the facts and data underlying his opinion:

Q. You didn't provide a written summary or report with regard to the testimony that you're providing today?

[State] Objection, Your Honor; relevance. May we have a side bar.

The Court: Step up, Counsel.

(Bench Conference)

The Court: I'll overrule the objection.

[Defense Counsel] You didn't re – prepare or provide a written report to this – in this case?

A. No.

Q. And so, no information with regards to any studies, or scientifically peer reviewed studies. Or anything like that were provided to the defense with regard to what your opinions rely on?

A. No.

Q. And you haven't provided or made reference to any scientific basis for your opinions today?

A. No.

(6/24/12 Tr., p.437, Ls.18 - p.438, L.13).

The District Court held that the "state should have been required to provide a more complete disclosure to Ms. Morin concerning Dr. Dawson's testimony. However, the court also finds that while Judge Gardunia did err in denying the Motion to Compel, Ms. Morin has not demonstrated that her substantial rights were violated." (R., p.208) The District Court applied the incorrect standard as Ms. Morin is not required to demonstrate that her substantial rights were violated. Where a defendant alleges error at trial that he contemporaneously objected to, the appellate court reviews the error on appeal under the harmless error test. *State v. Almaraz*, 154 Idaho 584, 598, 301 p.3d 242, 256 (2013). If the appellate court finds that the district court erred, then the appellate court must declare a belief beyond a reasonable doubt that the error did not affect the outcome of the trial, in order to find that the error was harmless and not reversible. *Id.* Therefore because the district court erred in its analysis and in fact found an abuse of discretion, a reversal is necessitated, unless that State proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.*

Dr. Dawson's testimony regarding all of the above was more than just known and generally accepted scientific principles of absorption, distribution, metabolization, and excretion of drugs. This testimony was unsupported by any scientific studies or peer reviewed studies, or journal articles and, even after questioning by the defense, Dr. Dawson could not name or provide the relevant data and science behind his opinions. One of the most alarming issues is Dr. Dawson's testimony specifically about a drug called Effexor and how that one specific central nervous system depressant is not known to cause HGN. (6/23/13 Tr. p.429, Ls.12-14). Yet he could provide no scientific data to back that claim up and Trooper Jayne who is a certified Drug Recognition Evaluator testified that ***all*** CNS depressants cause HGN and that it is very similar to alcohol. (6/23/13 Tr. p.310, Ls.3-25 – p.312, Ls. 1-25).

Dr Dawson's entire testimony was an attempt by the State to prove guilt by whatever means necessary. In essence the expert was allowed to get on the stand and testify as to anything he wants, or anything which would tend to make the State's case stronger, without writing a report and providing the underlying facts and data which would support those opinions, making it impossible for the defense to properly cross examine him – or obtain an expert of her own to contradict his unknown testimony – because Ms. Morin had no idea what his testimony was going to be. The State was permitted to present undisclosed evidence against Ms. Morin, in blatant violation of Ms. Morin's constitutional rights to due process and a fair trial. This is the type of trial-by-ambush that was supposed to be eliminated by the adoption of the rules of discovery.

While the trial court correctly perceived the issue as discretionary, it failed to act within the legal standards applicable and the trial court did not come to the conclusion by an exercise of reason. As part of this exercise, the trial court is required to weigh the prejudice that may affect

the party suffering from the non-disclosure, and in this case, the trial court did not weigh the prejudice against Ms. Morin, thereby further abusing its discretion.

Because the trial court denied Ms. Morin's Motion to Compel and the State was not required to provide a written report of Dr. Dawson including the underlying facts and data upon which he relied and because the defense objected to all testimony from Dr. Dawson, Ms. Morin was unable to adequately defend herself against the State's case. Ms. Morin was unable to challenge the evidence presented against her at trial and unable to adequately cross-examine Dr. Dawson or even meaningfully challenge any provided testimony because the defense did not have an opportunity to present a report to its own expert or conduct adequate preparation for meaningful cross-examination. Because the trial court abused its discretion, depriving her of her constitutional right to due process and a fair trial, and the District Court erred in its analysis regarding a substantial prejudice, the State is unable to establish that the error was harmless beyond a reasonable doubt, and Ms. Morin's conviction should be vacated, with the matter remanded for a new trial.

II.

The Trial Court Err When It Denied Ms. Morin's Motion In Limine, Which Sought To Exclude All Testimony Regarding Carboxy-THC, A Simple Metabolite Of THC

A. Introduction

Because Carboxy-THC is, by law, not an intoxicant, all testimony and evidence of intoxication due to Carboxy-THC, namely the lab test result confirming the presence of Carboxy-THC in Ms. Morin's blood and opinion evidence from Trooper Jayne and Dr. Dawson that Ms. Morin was under the influence or impaired due to the presence of Carboxy-THC, should have been excluded.

B. Standard of Review

A trial court has discretion in the admission or exclusion of expert testimony, and its decision will be reviewed for an abuse of discretion. *State v. Perry,* 139 Idaho 520, 521 (2003); *State v. Critchfield,* 153 Idaho 680, 683, 290 P.3d 1272, 1275 (Ct.App.2012). In reviewing a discretionary decision of a trial court, this Court reviews the record to determine if the lower court: (1) perceived the issue as one of discretion; (2) acted within the bounds of discretion and consistently with any legal standards; and (3) reached its decision by an exercise of reason. *Johnson*, 148 Idaho at 669.

C. The Trial Court Erred When It Denied Ms. Morin's Motion In Limine, Which Sought To Exclude All Testimony Regarding Carboxy-THC, A Simple Metabolite Of THC

Mr. Morin was charged with violating Idaho Code § 18-8004(1), which makes it unlawful to "drive or be in actual physical control of a motor vehicle" while "under the influence of alcohol, drugs or any other *intoxicating* substance . . . ." I.C. § 18-8004(1)(a) (emphasis added). According to the evidence, one of the substances found in Ms. Morin's blood was Carboxy-THC. As a matter of law, Carboxy-THC is *not* an intoxicating substance. *See Idaho Transp. Dep't v. Reisnauer*, 145 Idaho 948 (2008). Thus, the presence of Carboxy-THC in Ms. Morin's blood is not relevant to the charge of driving "under the influence of alcohol, drugs or any other intoxicating substances," and evidence of the presence of Carboxy-THC in Ms. Morin's blood should have been excluded. *See* I.R.E. 401 (defining relevant evidence); I.R.E. 402 ("Evidence which is not relevant is not admissible."). Similarly, any opinion evidence from a police officer, lab personnel, or other witness that Ms. Morin was unable to operate a vehicle safely because she was under the influence of cannabis should have been excluded because there is no recognized scientific basis to support such an opinion and such opinion evidence accordingly would be without foundation and not relevant to any facts at issue in the

case. *See* I.R.E. 401, 402, 403, 702. Finally, because Carboxy-THC is not intoxicating, there can be no inference that any impairment observed by the officer was caused by Carboxy-THC, and accordingly, any testimony or other evidence regarding any observations of impairment must be excluded.

In *Reisenauer*, the Court addressed the presence of Carboxy-THC in the context of an administrative license suspension. The Court held that Carboxy-THC "is not in and of itself a drug" and that "it is only a metabolite of a drug." *Reisenauer*, 145 Idaho at 950-51. Thus, the presence of Carboxy-THC "in a urine sample is no evidence of the presence of any drug" and "there clearly was not substantial competent evidence [the defendant] failed an evidentiary test for drugs." *Id.* at 951. As the Court explained, "the drug that must be present also must be *intoxicating*." *Id.* (emphasis in original). Because the Department of Transportation had "not alleged or proved that Carboxy-THC is intoxicating, and since the test results revealed only the presence of Carboxy-THC, [the defendant] met his burden of proving that the results did not show the presence of drugs or other intoxicating substances." *Id.*

The holding in *Reisenauer* is that the presence of a substance in a defendant's blood is relevant under Idaho's DUI statutes only if that substance is intoxicating, and (2) holds that an officer's observations of a defendant's impairment support an inference that the impairment is caused by a substance found in the defendant's blood only when there is separate proof that the substance is intoxicating.

In the most recent case to consider the issue of Carboxy-THC —the Court of Appeals held, "Because the toxicology report indicated the presence of Carboxy–THC, but not THC, it was, in essence, a negative drug test. The State did not present sufficient evidence to demonstrate marijuana intoxication at the time Stark was driving. *State v. Stark*, 2013 WL 1338841 (Ct.App.

2013). It further held, "Although the State proved that Stark was impaired, and that he had used marijuana at some point in the past, the evidence presented by the State was insufficient to prove that Stark's impairment was caused by Stark's past marijuana use." *Id.* Finally, the Court held, "While it may be possible, through the use of expert testimony, to demonstrate that a person is under the influence of an unknown drug or intoxicating substance that *does not* appear on a toxicology report, the State did not present such testimony in this case. We again emphasize that the toxicology report *did not* reveal the presence of an intoxicating drug or substance, which, together with evidence of Stark's impairment, would almost certainly have been sufficient to prove a violation of section 18-8004 under the totality of the evidence method of proof." *Id.*

In the present case, one of the substances found in Ms. Morin's blood, Carboxy-THC, is *not* intoxicating. Thus, the presence of Carboxy-THC is not relevant and such evidence should have been excluded. Further, because Carboxy-THC is not intoxicating, there can be no inference that any observations of impairment was caused by the Carboxy-THC.

Courts from other states have also held that Carboxy-THC is not an intoxicant and that the presence of Carboxy-THC does not demonstrate that an individual is under the influence of an intoxicant. In *People v. Feezel*, 783 N.W.2d 67 (Mich. 2010), the Supreme Court of Michigan vacated a defendant's conviction under Michigan's DUI laws, holding that Carboxy-THC is not an intoxicant, "has no known pharmacological effect," and that a "person cannot be prosecuted" under the DUI laws "for operating a motor vehicle with any amount of" Carboxy-THC "in his or her system." *Id.* at 83. In so holding, the court noted "no federal court has held that [Carboxy-THC] is a controlled substance." *Id.* at 81. In *Spires v. Raymond Westbrook Logging*, 997 So.2d 175 (La. Ct. App. 2008), the Court of Appeals of Louisiana held, in the context of a worker's compensation benefits determination, that "intoxication" was not

established where the toxicology report showed the presence of Carboxy-THC, "the nonpsychoactive metabolite of THC," because "Carboxy THC is not an indicator of intoxication." *Id.* at 176, 179.

Because Carboxy-THC is not, as a matter of law, an intoxicant, the presence of Carboxy-THC in Ms. Morin's blood was not relevant to the charge against her of driving "under the influence of alcohol, drugs or any other intoxicating substances." I.C. 18-8004(1). Evidence of the presence of Carboxy-THC in Ms. Morin's blood should have been excluded. Similarly, any opinion evidence from a police officer, lab personnel, or other witness that Ms. Morin was driving under the influence of an intoxicant based on the presence of Carboxy-THC in her blood must be excluded because there is no recognized scientific basis to support such an opinion and such opinion evidence accordingly would be without foundation and not relevant to any facts at issue in the case.

CONCLUSION

For the reasons set forth above, Ms. Morin respectfully requests that this court vacate her judgment of conviction and dismiss the case with prejudice as a sanction for the State's blatant disregard for the rules of discovery as well as the constitutional rights of Ms. Morin. In the alternative, this Court should vacate the judgment of conviction and remand her case for a new trial.

DATED this 18th day of August 2014.

HEIDI JOHNSON
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 18th day of August 2014, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter to:

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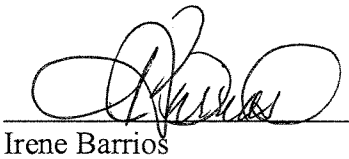

Irene Barrios